For an interesting critique on the questionable foundations for claim preclusion under the *res judicata* doctrine itself see Y. Sinai, Reconsidering Res Judicata: A Comparative Perspective, 21 Duke Journal of Comparative & International Law 353, which observes that "*Res judicata* changes white to black and black to white, it makes the crooked straight and the straight crooked." Sinai points out that in other justice systems the "discovery of truth" is a principle of justice "to which all else is subordinated." Certainly this principle should apply under these circumstances when a death sentence has been obtained by an officer of the court, who redacted an affidavit revealing the intent to exclude black jurors, engaged in multiple misrepresentations and committed a fraud upon the court. For Justice Alito, however, something more important than justice is on his agenda—countering the trend in granting direct review of state court decisions that deny post-conviction relief because this allows the Court to escape from the bonds of AEDPA.

Because of AEDPA's restrictions, a defendant seeking federal habeas relief has to overcome 28 U.S.C. 2254(d), which requires a federal habeas petitioner to show that the state court's decision denying relief was either "contrary to or an unreasonable application of a clearly established Supreme Court precedent." This statutory restriction of habeas corpus has been interpreted by the Supreme Court to require that a case already directly on point must exist. Otherwise the federal court must defer to the state court's determination (*Woods v. Donald* [10]). The federal court's review moreover "is limited to the record that was before the state court" (*Premo v. Moore*[11]) and under *Harrington v. Richter*,[12] a federal habeas court must give deference to a state court's summary post-conviction order, consisting of a single sentence. For an example of the stark contrast in the type of "justice" delivered under direct review and AEDPA restricted habeas review see *Benner & Hartman, Supreme Court Watch: Ineffective Assistance of Counsel in the Robert Court, 36 NLADA Cornerstone 2 (2015).*

"The chief justice's opinion is instructive in helping to open the door in *Batson* hearings to the admission of evidence that is not directly attributable to the prosecutor."

As a result of the AEDPA restrictions on federal habeas corpus on federal court of appeals judge has called for its repeal. In a thoughtful law review article (disguised as a preface) which analyzes the numerous failings of our criminal justice system, Judge Kozinski, of the Ninth Circuit stated:

> We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted. Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal. There are countless examples of this, but perhaps the best illustration is *Cavazos v. Smith*, the case involving a grandmother who had spent 10 years in prison for the alleged shaking death of her infant grandson — a conviction secured by since-discredited junk science. My court freed Smith, but the Supreme Court summarily reversed (over Justice Ginsburg's impassioned dissent) based on AEDPA.
>
> AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.[13]

Justice Alito, (and Justice Thomas, who dissented in *Foster* [14]) would, however, in the interest of finality, give priority to state procedures designed to limit post-conviction review, and thus like AEDPA defer to each state's determination of the scope of federal constitutional rights. While Alito acknowledged that "*Batson* is essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends," he appears to believe that the Court should nevertheless defer to "state courts to structure their systems of post-conviction review in a way that promotes the expeditious and definitive disposition of claims of [Batson] error.

Conclusion

In an article for the New Yorker, commenting on the *Foster* case, Gilad Edleman reported that while there are no comprehensive statistics on how often prosecutors use peremptory challenges to strike jurors based upon race,

> there is little doubt that the practice remains common, especially in the South. In Caddo

"*Batson* is a reminder that a legal system formally blind to race is just as often blind to racism."

> Parish, Louisiana, prosecutors struck forty-eight per cent of qualified black jurors between 1997 and 2009 and only fourteen per cent of qualified whites... In 2012, a North Carolina judge found that in capital cases between 1990 and 2010 prosecutors statewide struck potential black jurors at twice the rate of non-blacks.[15]

Foster was tried in Kentucky in 1987 just after *Batson* had been decided. It is unlikely such blatantly revealing notes and records would be made, much less kept today, but at least the *Foster* decision is a sign that a the majority of the Court may be waking up to the reality that race plays a significant role in our criminal justice system and may be willing to do something about it — at least when the discrimination occurs in the courtroom.

The problem of implicit racial bias, however, still infects the jury selection process and the improper use of preemptory challenges will therefore always be difficult to combat. Justice Breyer has suggested that we abolish preemptory challenges, but the preemptory challenge is a necessary tool in the arsenal of the defense. It has also been suggested by others that a more realistic reform would be to bring transparency to the process by simply keeping track of prosecution strikes the same way we track racial statistics for traffic stops. That documentation could be undertaken by law schools and universities, and could involve not only students, but also tap a new resource — retirees from the baby boom generation — who could serve as court watchers to collect current data. As Edleman observed: "*Batson* is a reminder that a legal system formally blind to race is just as often blind to racism." ■

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1. *476 U.S.79 (1986).*
2. *2 545 U.S. 231 (2005).*
3. *552 U.S. 472, 477 (2008).*
4. *429 U.S. 252 266 (1977).*
5. *The approval of only four justices is needed to grant a petition for certiorari.*
6. *Anti-Terrorism and Effective Death Penalty Act.*
7. *489 U.S. 255, 260 (1989).*
8. *463 U.S. 1032 (1983).*
9. *"[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Id. at 1044.*
10. *135 S. Ct. 1372 (2014).*
11. *562 U.S.115 (2011).*
12. *562 U.S. 86 (2011).*
13. *Hon. Alex Kozinski, Preface, Criminal Law 2.0, 44 Geo. L. J. Ann. Rev. Crim. Proc (2015) xli-xlii.*
14. *Thomas also claimed in dissent (without a shed of support from the record) that "the likely explanation for the [Georgia Supreme Court's] denial of [state] habeas relief is that Foster's claim is procedurally barred." But as Roberts pointed out in a footnote, "there is no way to know this, of course, from the face of the Georgia Supreme Court summary order." Thomas also dissented on the merits, finding that Foster had not made out a Batson claim.*
15. *Gilad Edelman, Why Is It So Easy to Strike Black Jurors? New Yorker, June 5, 2015.*
16. *Id.*

Maryland's Model Is Working

Training Social Workers in a Holistic Defense Practice

"Community-oriented and holistic defense offices seek to utilize a multidisciplinary team, including a diverse group of attorneys, social workers and investigators."

By Lori James-Townes

Providing appropriate mental health and substance abuse treatment, job training, and social support to individuals within the criminal justice system has been a focus of the social work profession since its inception. It has only been in recent decades, however, that researchers began to examine and discuss the need for and use of social workers within public defender offices in this country.[1]

Community-oriented and holistic defense offices seek to utilize a multidisciplinary team, including a diverse group of attorneys, social workers and investigators.[2] This model recognizes that public defenders serve the same clientele being serviced by social workers in other settings. Therefore, the mission to provide holistic representation shared by social workers and public defenders creates a working relationship that merges well to meet the needs of the indigent clients they represent.

By strengthening its Social Work Division through staffing practices, internal collaborations, external social work experts, intern placements and quality trainings, the Maryland Office of the Public Defender has been able to enhance team collaborations with attorneys, providing a national model for holistic defense practices. This investment in social work has yielded better outcomes for clients and, in turn, better performance and cost savings for the criminal justice system as a whole.

The History and Practice of Defense Teams in Maryland

The State of Maryland has been committed to the criminally accused and convicted for more than a century, evidenced by the establishment of the Prisoners' Aid Association of Maryland in 1896. Following the Supreme Court decision of *Gideon v. Wainwright*, and in keeping with this tradition of providing basic representation to those charged of crimes, the General Assembly established the State of Maryland Office of Public Defender (MOPD) in 1971. The value of having social workers as part of the defense team in MOPD has been recognized for quite some time; as such the office has maintained social work staff for more than 20 years. Since its founding, MOPD has grown from an agency of 72 lawyers and 17 locations to 570 lawyers, 320 support staff, 28 social workers and more than 35 social work interns, serving over 50 locations.

The MOPD statewide Social Work Division has become an essential